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**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEVADA**

IN RE WAL-MART WAGE AND HOUR  
EMPLOYMENT PRACTICE LITIGATION

**MDL 1735**

2:06-CV-00225-PMP-PAL  
(BASE FILE)

THIS DOCUMENT RELATES TO:  
ALL ACTIONS

**PLAINTIFFS' REPLY TO APPELLANT FATIMA ANDREWS' RESPONSE TO CLASS  
COUNSEL'S MOTION FOR APPEAL BOND**

1 Now Come the Plaintiffs, by and through their undersigned counsel, and reply to the  
2 submission entitled *Opposition to Motion for Appeal Bond for Objector Fatima Andrews*  
3 (hereafter, "Opposition "). *See* Docket no. 603. Equally as bad as the fact that the Objector  
4 Andrews Response is riddled with unprofessional and unpersuasive personal attacks and  
5 mischaracterizations is the fact that substantively it is void of fact and law that addresses the  
6 considerations that the Court must evaluate and thus does not assist the Court in its necessary  
7 analysis.<sup>1</sup> Moreover, the smattering of relevant material that is offered in the Opposition  
8 actually serves to supplement the already overwhelming justification in the record for the  
9 assessment of the requested bond as to Fatima Andrews (hereafter, "Objector", and/or  
10 "Andrews"). Plaintiffs request this court note that the Opposition does not rebut the majority of  
11 the facts, legal authority and argument contained in the Memorandum in Support of Appeal  
12 Bond for Objector Fatima Andrews (hereafter, "Moving Papers" or "Request for a Bond") thus,  
13 leaving that portion of the moving papers un rebutted. *See* Docket nos. 586-591.

14 The most obvious failure of the Response is that it does not offer any analysis or rebuttal  
15 of the facts, argument and law presented in Plaintiffs' Moving Papers. In fact, Plaintiffs'  
16 argument and legal authority is responded to only by general, often non-applicable and  
17 sometimes unsupported proclamations. There is little evidence that the Objector did more than  
18 scan the Moving Papers. Clearly the Objectors chose to ignore the relevant points and authorities  
19 relied on or strategically opted to offer red herrings rather than meet the content of the Request  
20 for a Bond head on.

21 The Objectors' Opposition is also unconvincing because what is offered as argument  
22 *against* Class Counsels request for a bond merely: 1) repeats Class Counsels' arguments against  
23 the prohibited costs requested by Beasley/Mills; and 2) does not offer legal support for ignoring  
24 the validity of the actual costs used by Class Counsel in arriving at their Bond request. Class  
25 Counsels here are seeking the assessment of a bond for discrete and well supported reasons and  
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27 <sup>1</sup> Curiously the Objector devotes entire sections of their opposition to perceived arguments relating to whether the  
28 appeal is frivolous despite the fact that the moving parties did not advance that issue in their moving paper and  
devote even more pages to a different case that is not even tangentially relevant and an expert opinion that is even  
farther afield.

advance a request that is far different than the request of Carolyn Beasley-Burton's and the Mills Firm's (hereafter, "Beasley Burton/Mills Firm") motion. The Plaintiffs through the under signed counsel have objected to the Beasley Burton/Mills Firm bond request. *See* Docket no. 535, Motion for Appeal Bond to be Required Posted by Objectors Gaona, Swift, Andrews and Maddox and Their Attorneys and Seeking Any Other Appropriate Relief to Protect the Class, December 18, 2009.

Specifically<sup>2</sup>,

1. Class Counsels have asked for a bond that does not include attorney's fees; yet, the Objectors complain that the inclusion of delay costs are treated the same as attorneys fees under *Azizian*<sup>3</sup>. Objectors have yet again missed the point. The rule in *Azizian* is that "a district court may require an appellant to secure appellate attorney's fees in a Rule 7 bond, but only if an applicable fee shifting statute includes them in its definition of recoverable costs, and only if the appellee is eligible to recover such fees. *Id.* at 953. All the costs requested by Class Counsels are either costs specifically recoverable under Rule 39 or supported under 9<sup>th</sup> Circuit or statutory authority. *See e.g. In re Broadcom Corp.*, 2005 U.S. Dist. LEXIS 45656 (administrative costs); 28 U.S.C. sec. 1920 and Fed R. Civ P 54(d) (deposition costs); 28 U.S.C. sec 1961 (Interest).
2. Class Counsels have asked for a bond of \$609,000. Objectors complain that the amount requested is too high. Here, the desperation of the Objectors is apparent and results in this unprofessional and unpersuasive personal attack as opposed any factual response on the merits. It is Objectors' sole responsibility and burden to provide proof of economic circumstances and they have failed to do so. That the Objectors did not take the time to meet their burden of proof and are seeking to take a gifted

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<sup>2</sup> Items where all Parties agree are not addressed except as overlap with relevant argument.

<sup>3</sup> The fee shifting statute in this case indicates: "court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action. 29 U.S.C.A. § 216. Costs under fee-shifting statutes such as the FLSA include all reasonable *out-of-pocket* expenditures. *Zabkowicz v. West Bend Co.*, 789 F.2d 540, 553 (7th Cir.1986); *Henry v. Webermeier*, 738 F.2d 188,

short cut by asking this Court to go out of its way to find facts they failed to introduce into the record ignores the fiduciary duty this Court has to the Certified class and merely serves to establish they are clearly not invested enough in the outcome to warrant any further consideration on that point.

3. Objectors claim that the *Vaughn* case somehow prevents inclusion of interest in the analysis in this case is simply incorrect. First, the *Vaughn* case is from the 5<sup>th</sup> Circuit, not the 9<sup>th</sup> Circuit and Objectors have failed to cite any 9<sup>th</sup> Circuit authority to rebut Plaintiffs request. Second, 28 U.S.C. sec 1961 provides that interest should accrue on this final judgment. Third, it is undisputed that short of this appeal, the Class would have gained the benefit of the monetary settlement and would be gaining the benefit of interest on that settlement. The Objectors actions delaying the distribution of the settlement undisputedly results in lost interest to the Class. Consideration of interest not only protects the Class but also serves the public policy concerns supporting assessment of appellate bonds.
4. Class Counsel have asked that the Court *not* consider the frivolous nature of the Objector's appeal and underlying Objection; yet, the Objectors complain that Plaintiff's counsel seeks a bond because the Objectors' appeals and Objections are frivolous.<sup>4</sup> See Opposition Motion at 5-11.
5. Objector Andrews claims she filed a claim benefit by the November 9, 2009 deadline. See Opposition Motion at 6. However, Amanda Myette, Project Manager for Rust Consulting, Inc., submitted an affidavit that stated Andrews did not submit the claim form prior to the deadline. See Attachment A, Affidavit of Amanda J. Myette

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192 (7th Cir.1984); *Monroe v. United Air Lines, Inc.*, 565 F.Supp. 274, 280 (N.D.Ill.1983), *rev'd on other grounds*, 736 F.2d 394 (7th Cir.1984). *Shorter v. Valley Bank & Trust Co.* 678 F.Supp. 714, 726 (N.D.Ill., 1988).

<sup>4</sup> This is a fact that Plaintiffs dispute and will advance at the correct stage of the proceedings. Plaintiffs have created a record that supports the finding of bad conduct and the frivolous nature of the appeal but for the express purpose of asking the Ninth Circuit Court of Appeals to consider it and reconsider its ruling in *Azizian v. Federated Department Stores, Inc.*, 499 F.3d 950, in light of current widespread abuse of class action procedure by professional objectors in present day class actions. These arguments were expressly limited to making a record for appeal only and Plaintiffs again specifically request that this Court not rely on them in setting the amount of bond.

1 Relating to the Failure of Objectors Gaona and Andrews to File a Claim. Objector  
2 Andrews' claim she submitted a claim prior to the deadline is false.

- 3 6. Reasonable interest costs have been projected by an economist and submitted by  
4 Plaintiffs in the form of an affidavit. Reasonable administrative costs have been  
5 projected by the claims administrator and submitted by the Plaintiffs in the form of a  
6 declaration. Plaintiffs have submitted all other reasonable FRAP 7 costs by  
7 declaration. Objector Andrews has asked for protection against the actual costs the  
8 Class is projected to incur as a result of the delay caused by the objective change in  
9 circumstance presented by the appeal. *See* Opposition Motion at 3-5. Class Counsel  
10 have appropriately asked for interest to be included in the appeal bond.
- 11 7. Finally, Plaintiffs' Counsels have requested that the bond be limited to offering them  
12 only the traditional protections afforded by bonds. Specifically, they have asked for  
13 protection against *actual costs* they will incur as a result of the delay caused by the  
14 objective change in circumstance presented by the appeal. Despite this, Objector  
15 Andrews' declares, without rationale or authority, that the power of the Court to  
16 award those administrative costs in the bond are strictly prohibited.<sup>5</sup> In support,  
17 Class Counsels offered fact, expert opinion and legal argument to establish those  
18 related costs and then went further in adopting the most conservative estimate  
19 available. That they offer proclamations without offering any support or argument  
20 runs against both the public policy underlying the assessment of a bond and the duty  
21 of Class Counsel to serve the best interest of the class by seeking out and making use  
22 of the best and most cost effective means to an end.

23 The Plaintiffs have satisfied the requirements of a bond. In response, Objector Andrews  
24 has not rebutted any of Plaintiffs' relevant arguments, assertions of fact as pertaining to matters  
25 that fall within the purview of this Courts consideration on the requested bond.

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28 <sup>5</sup> *In re Broadcom Corp. SEC. Litig.*, 2005 U.S. Dist. LEXIS 45656 (D.D. CA 2005); *See also Heritage Bond*, 2005  
U.S. Dist. LEXIS 13627, at 7 (C.D. Cal. 2005), *In re Pharm. Indus. Average Wholesale Price Litig.*, 520 F. Supp. 2d  
274, 277-278 (D. Mass. 2007).

WHEREFORE, Plaintiffs respectfully request that this Court enter an Order granting Plaintiffs request for bond in the amount and for the reasons previously set forth and/or for such other relief as the Court deems just and proper.

Dated: March 5, 2010

Respectfully submitted:

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**CERTIFICATE OF SERVICE**

I hereby certify that on March 5, 2010, a copy of the foregoing *Plaintiffs' Reply to Appellant Fatima Andrews' Response to Class Counsel's Motion for Appeal Bond* was filed electronically [and served by mail on anyone unable to accept electronic filing]. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system [or by mail to anyone unable to accept electronic filing]. Parties may access this filing through the Court's system.

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